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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JAMES DONATO, JUDGE

IN RE FACEBOOK BIOMETRIC)
INFORMATION PRIVACY LITIGATION) **No. 15-cv-03747-JD**

FREDERICK WILLIAM GULLEN,)
individually and on behalf of)
all others similarly situated,)

Plaintiff,)

VS.)

No. 16-cv-00937-JD

FACEBOOK, INC.,)

Defendant.)

San Francisco, California
Thursday, March 29, 2018

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on next page)

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Thursday - March 29, 2018

10:10 a.m.

P R O C E E D I N G S

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THE CLERK: Calling related action Civil 15-3747,
In re Facebook Biometric Information Privacy Litigation, and
Civil 16-937, Gullen versus Facebook.

Counsel, please state your appearances for the record.

MR. TIEVSKY: Good morning, Your Honor. Alexander
Tievsky for the user plaintiffs.

MR. MILIAN: Good morning, Your Honor. David Milian
for the Gullen nonuser plaintiffs.

MR. WILLIAMS: Good morning, Your Honor. Shawn
Williams, Robbins Geller Rudman & Dowd, on behalf of
plaintiffs. I'll be addressing the summary judgment issues for
plaintiffs, and the scheduling.

THE COURT: Scheduling, good. Okay.

MR. RHODES: Good morning, Your Honor. Corban Rhodes,
from Labaton Sucharow, on behalf of user plaintiffs.

MR. GEORGE: Good morning, Your Honor. John George,
Robbins Geller Rudman & Dowd, on behalf of user plaintiffs.

MS. GOLDMAN: Good morning, Your Honor. Lauren
Goldman, of Mayer Brown, representing Facebook.

I just wanted to let the Court know that Nikki Sokol, from
Facebook, is also here with us today as well.

THE COURT: Who?

1 **MS. GOLDMAN:** Nikki Sokol from Facebook.

2 **THE COURT:** Okay. Yes.

3 **MR. RAYFIELD:** Good morning, Your Honor. Michael
4 Rayfield, from Mayer Brown, on behalf of Facebook. I'll be
5 addressing the summary judgment motion.

6 **THE COURT:** Okay.

7 **MR. NADALENCO:** Good morning, Your Honor. John
8 Nadalenco, of Mayer Brown, also on behalf of Facebook.

9 **MR. CONNELLY:** Finally, Judge, good morning. Vincent
10 Connelly, with Mayer Brown, on behalf of Facebook.

11 **THE COURT:** All right. Let's start with Gullen.

12 Is it Mr. Milian?

13 **MR. MILIAN:** Yes.

14 **THE COURT:** Come on up. And one person from
15 defendant, please.

16 **MS. GOLDMAN:** Your Honor, is this on the
17 classification motion?

18 **THE COURT:** Summary judgment.

19 I'm having doubts, Mr. Milian.

20 **MR. MILIAN:** Let me allay your doubts.

21 **THE COURT:** And you are too, because you filed
22 something this morning with a new action.

23 **MR. MILIAN:** We did, Your Honor.

24 **THE COURT:** Yes. So here's the issue. Appears to be
25 undisputed that your client was on the business side of

1 Facebook. What do you call that side?

2 **MR. RAYFIELD:** Business organization page.

3 **THE COURT:** Business organization page, where they
4 don't -- they don't do the biometric data collection; is that
5 right?

6 **MR. RAYFIELD:** Correct.

7 **THE COURT:** Okay.

8 **MR. MILIAN:** It's that latter part that's in dispute,
9 Your Honor.

10 **THE COURT:** I didn't see -- I know you say that. But
11 what's the evidence that shows that Facebook has lied to me,
12 basically, by saying they don't do it?

13 **MR. MILIAN:** We took the deposition of Facebook's
14 30(b)(6) representative back in October 18th of 2016. The
15 transcript's on file. Mr. Yaniv Taigman. He was asked
16 specifically:

17 **"Q.** Does Facebook apply its facial recognition technology
18 to all photos uploaded to Facebook within the
19 United States?

20 **"A.** Like I mentioned before, photos are being processed
21 on Facebook with several -- with several functions. There
22 is a pipeline that photos go through. Like I mentioned,
23 detection alignment and face signature creation. Which
24 one of those are you referring to?

25 **"Q.** All of them.

1 **"A.** All right. So, yes, I said that uploaded photos go
2 through that specific pipeline.

3 **"Q.** Every photo?

4 **"A.** Every -- I mean, like, photo -- like I mentioned, we
5 talked previously about JPEGs, uploaded photos, yeah. I
6 mean, like, uploaded photos by Facebook users naturally go
7 through that pipeline."

8 That was the 30(b)(6) deposition testimony. An errata
9 sheet was filed thereafter.

10 **THE COURT:** Is that Mr. Yadan?

11 **MR. MILIAN:** That's Yaniv Taigman.

12 Mr. Yadan, subsequently, after the close of discovery,
13 filed an affidavit that seems to contradict their 30(b)(6)
14 deposition testimony. And he does so in a way that --

15 **THE COURT:** Let me ask you a question. What was the
16 30(b)(6) -- for what topic was he designated? What was the
17 precise request?

18 **MR. MILIAN:** I don't have that with me, Judge, but it
19 was broad. He was the inventor of the facer technology that is
20 the subject matter of the case. So it was, how does your
21 technology work?

22 And -- and later we asked him:

23 **"Q.** Would you say that you know more about this
24 technology than -- this facial recognition technology that
25 Facebook operates than anyone else?

1 **"A.** Yes. When you say 'this,' I mean in general, like,
2 the face recognition technology that Facebook has, yes,
3 I'm the one that knows the best."

4 That was the testimony of Facebook in October of 2016.

5 **THE COURT:** All right. Mr. Rayfield, is that right?

6 **MR. RAYFIELD:** There's no dispute that -- well,
7 putting aside the issue of whether facial recognition is run on
8 pages, there's no dispute that facial recognition was not run
9 on the one photo of Mr. Gullen that was uploaded from Illinois.

10 There were no --

11 **THE COURT:** And that was because he was on the
12 business organization page.

13 **MR. RAYFIELD:** At the time Facebook was not running
14 facial recognition on business organization pages, at the time
15 that the photo of Mr. Gullen was uploaded to Facebook.

16 **THE COURT:** Tell me why that's undisputed. Tell me
17 why you think that's an ironclad fact.

18 **MR. RAYFIELD:** Because the evidence shows we've --

19 **THE COURT:** That's Mr. Yadan's declaration.

20 **MR. RAYFIELD:** Mr. Yadan's declaration and the
21 documents attached to the declaration show that facial
22 recognition -- there was no --

23 **THE COURT:** How do you get around this long snippet
24 that Mr. Milian just read?

25 **MR. RAYFIELD:** The snippet that Mr. Milian just read

1 was not purporting to be an exhaustive -- exhaustive testimony
2 about all the situations in which Facebook runs facial
3 recognition.

4 There are -- there are extensive documents in the record
5 that we've -- that we've provided in -- as an attachment to the
6 Provance declaration, which we attached to our reply, which
7 showed that -- which say, in several occasions, recognition is
8 turned off on pages. Recognition wasn't necessary for page
9 photos, and so it was left out of the upload flow.

10 We've cited at least 30 documents in the Provance
11 declaration that say the exact same thing.

12 **THE COURT:** Well, it seemed to me, effectively, what
13 you're saying is the witness that your colleague is relying on
14 was just overstating his understanding of the facts. Is that
15 right?

16 **MR. RAYFIELD:** I wouldn't say he was overstating it.
17 I think he was saying that --

18 **THE COURT:** He said all pictures are uploaded. And
19 you're telling me that, in fact, was not the case.

20 **MR. RAYFIELD:** He was not purporting -- he was not
21 saying that facial recognition is performed on all photos
22 uploaded to the service.

23 He was testifying -- he was giving testimony about --
24 about how the technology works -- works generally, without
25 purporting to explain the exceptions that are applied in

1 situations like pages and comment posts and things like that.

2 **THE COURT:** What did you -- what did you provide to
3 the plaintiffs in terms of discovery on the business
4 organization page and scanning?

5 In other words, why is it fair to say they should have
6 known, before you filed summary judgment, that the photograph
7 for Mr. Gullen would not have been uploaded -- the biometric
8 data would not have been collected from his photo?

9 **MR. RAYFIELD:** So we provided the documents in the
10 Provance declaration, which say that recognition is turned off
11 on pages. And this is -- the citations are in paragraphs 4
12 through -- through 5 of that -- of that declaration.

13 **THE COURT:** All right. And those documents were
14 produced to Mr. Milian well before summary judgment?

15 **MR. RAYFIELD:** Yes.

16 **THE COURT:** Is that right, Mr. Milian?

17 **MR. MILIAN:** Judge, that declaration, if it's the
18 declaration I'm thinking of, was in December of 2017, after the
19 cutoff of discovery.

20 **THE COURT:** Well, but the declaration attached what
21 Facebook says was the documents that would have tipped you off.

22 **MR. MILIAN:** Right. And the documents refer to pages.
23 And, you know, here's one of the documents. And I've
24 highlighted the part that references pages. A lot of it is
25 redacted.

1 And we're supposed to be clairvoyant and read this and say
2 "pages" means business and organizational accounts. And
3 it's -- even though redacted, it's still unclear because it
4 says facial recognition, clustering and recognition wasn't
5 necessary for page photos.

6 The way the pipeline works -- and I could read this --
7 recognition is the last step performed. Clustering is the
8 grouping, and then recognition is the final step. Before that,
9 you have detection. After that, you have alignment. Then you
10 have a next step, which is classification.

11 Our experts --

12 **THE COURT:** Well, let me just jump in. All I'm
13 concerned about is, did you have fair notice?

14 You're asking for more discovery. I'm finding that to be
15 unpalatable at this stage of the case. And so what I'm trying
16 to figure out is, whether you read it or got it or not, if it
17 was in your hands, it was enough for me. And it sounds like it
18 was in your hands.

19 **MR. MILIAN:** Judge, here's the thing. Yadan wasn't
20 their 30(b)(6) representative. Mr. Taigman was. Yadan makes
21 this statement without referring to any source code.

22 The experts in this case, both sides, have gone through
23 millions of lines of source code. Neither of them -- our
24 expert, the source code review didn't reveal any of this. And
25 when we deposed their expert, we asked him, Did you review the

1 source code related to this page/nonpage turning on and off?
2 He said no. Why not? Didn't bother.

3 Okay. So the source code would be -- and it's probably
4 about ten lines of source code. If they could point us to or
5 replicate the source code that turned off -- or turned off the
6 application of facial recognition technology, as they say, to
7 business and organizational pages, we could have our expert
8 review it. That would not be burdensome.

9 **THE COURT:** The point is, Mr. Milian, you had the
10 statements about, quote, pages, unquote, in hand and you didn't
11 ask.

12 **MR. MILIAN:** But "pages" doesn't tell me --

13 **THE COURT:** You have to ask. You're not just a
14 passive vessel. You need to say, hey, I don't understand what
15 this means, I think I'll ask a witness, or I'll serve an
16 interrogatory, or I'll call up the lawyer on the other side and
17 say can we do this informally.

18 They don't need to feed you. You need to be proactive in
19 figuring out your case.

20 **MR. MILIAN:** Understood, Judge.

21 **THE COURT:** You had the raw materials. That's all I'm
22 interested in. What you did when them, that's up to you. My
23 only concern is if you didn't have the raw materials, I would
24 be concerned. But if you had the raw materials and they didn't
25 get digested, I'm less concerned.

1 Let me ask you this.

2 **MR. MILIAN:** Sure.

3 **THE COURT:** Philadelphia. So the other photo of your
4 client was taken in Philadelphia and uploaded in Michigan; is
5 that right?

6 **MR. MILIAN:** Correct.

7 **THE COURT:** Okay. All right. So that's clearly not
8 going to be enough to go forward on.

9 **MR. MILIAN:** I would concede that, Judge. That's not
10 part of our class.

11 **THE COURT:** So you're going to live or die on the
12 business organization page issue?

13 **MR. MILIAN:** That's correct, Your Honor.

14 **THE COURT:** Okay. That's all I need for that. Thank
15 you.

16 I do want to talk about class cert on the other case.

17 **MR. RAYFIELD:** Your Honor, may I make one more point
18 on that case?

19 **THE COURT:** Sure.

20 **MR. RAYFIELD:** There's another document which is
21 addressed in -- on paragraph 29 of Mr. Yadan's declaration,
22 which is attached to our motion for summary judgment --

23 **THE COURT:** Okay.

24 **MR. RAYFIELD:** -- which cites a -- which cites a
25 document FBBIPA_00044567, which is not about pages generally.

1 That's about the analysis that was performed on Mr. Gullen's
2 own photo. And it shows that no face box was created from the
3 photo.

4 So it's not just that we provided information about pages
5 generally. We've also provided information about Mr. Gullen's
6 specific photos.

7 **MR. MILIAN:** That latter provision was after the close
8 of discovery, Your Honor.

9 **THE COURT:** All right. I will look through that.
10 Thank you.

11 Okay. Class cert for the other case, In re Facebook.

12 **MR. TIEVSKY:** Good morning again, Your Honor.

13 **THE COURT:** Mr. Tievsky.

14 **MR. TIEVSKY:** That's correct.

15 **THE COURT:** Okay. All right. Let me ask you a
16 question -- actually, Ms. Goldman.

17 So *Rosenbach*, Illinois Court of Appeal, Intermediate Court
18 of Appeals. *Rosenbach* was a fingerprint case, wasn't it, like
19 *SmartCart*?

20 **MS. GOLDMAN:** It was, Your Honor.

21 **THE COURT:** Okay. So I'm having trouble seeing how
22 that's particularly applicable here for the reasons that I
23 distinguished the fingerprint cases in my *Spokeo* decision. How
24 is it that they are applicable in this context?

25 **MS. GOLDMAN:** For several reasons, Your Honor.

1 One is that the question in *Rosenbach* was a certified
2 question. It wasn't limited to fingerprints. It was -- it
3 extended to all kinds of biometric identifiers.

4 So the certified question in *Rosenbach* was whether an
5 individual is an aggrieved person when the only injury he or
6 she alleges is a violation of BIPA by a private entity that
7 collected his or her biometric identifiers without providing
8 the disclosures and obtaining the written consent required by
9 the statute.

10 And the court answered that question unanimously in the
11 negative. So the opinion was -- this was a court that was
12 taking an interlocutory appeal to provide guidance to all the
13 trial courts in Illinois and elsewhere that are applying this
14 statute. And the Court took this broad certified question and
15 answered it in the negative.

16 **THE COURT:** Well --

17 **MS. GOLDMAN:** The second -- I'm sorry.

18 **THE COURT:** -- no judge here or in Illinois answers a
19 question in the abstract. The case is quite clear that it was
20 a thumbprint taken and that the plaintiff knew the thumbprint
21 was being taken because he put his thumb on the device.

22 There is no ambiguity about the fact that he and his mom,
23 I guess, were giving up their thumbprints. And, you know,
24 that's front and center in the description of the facts for the
25 case.

1 So I don't think it's just a free-floating riff on injury
2 under BIPA. It's tied to the facts of the *Six Flags* case,
3 which is entirely different from this one, as I explained in my
4 *Spokeo* decision.

5 **MS. GOLDMAN:** No, Your Honor, respectfully, we don't
6 agree with that. And here's why. The facts of this case were
7 not exactly what the Court just said.

8 The facts of this case were that Alexander went to the
9 park without his mother. Without his mother. He's a minor
10 child. He went to the park without his mother. He bought a
11 season pass. He was fingerprinted. He came home, and his
12 mother said, Where's your pamphlet? Where's the information?

13 And he said, What are you talking about? I didn't get any
14 pamphlet, I didn't get any information.

15 So the facts of *Rosenbach* were that the biometric
16 identifiers of a minor child were taken without notice, without
17 consent, without getting permission from his mother as the
18 legally authorized representative.

19 A child can't give knowing and -- knowing written consent.
20 So the facts of that case did not turn on the fact that
21 Alexander was aware that his fingerprint was taken or that his
22 mother was aware that his fingerprint was taken.

23 What his mother said in the complaint was that had she
24 known he was going to be fingerprinted she wouldn't have
25 authorized him to go by himself and get a season pass.

1 So it's not distinguishable on the basis of fingerprints,
2 and it's not distinguishable on the basis that people knew that
3 their biometric identifiers were being taken.

4 In addition, even if it were, that still would not remove
5 the predominance problem on class certification because, as
6 we've shown in the summary judgment motion that is not yet
7 ripe, Facebook had a data policy where it told people what it
8 was doing with its information, with the photographs. So even
9 if --

10 **THE COURT:** It's the same one I looked at for *Spokeo*,
11 isn't it?

12 **MS. GOLDMAN:** No, Your Honor. In your order on the
13 *Spokeo* motion, the Court said that it wasn't --

14 **THE COURT:** I haven't looked at the other one.

15 **MS. GOLDMAN:** -- considering any of that. It was
16 12(b)(1).

17 **THE COURT:** That's the same policy you attached
18 though; right?

19 **MS. GOLDMAN:** It is, but the Court said it didn't look
20 at it.

21 **THE COURT:** Well, I read it. I didn't rely on it. I
22 didn't say I didn't look at it, I didn't rely on it for my
23 decision. It's a very different thing. I did read that.

24 **MS. GOLDMAN:** Many people understood exactly what --

25 **THE COURT:** I don't recall the phrase "collected

1 biometric data" being anywhere in that disclosure.

2 **MS. GOLDMAN:** When we showed that data policy, which
3 the Court has already held everybody in the class is bound to,
4 and we showed it to one of the plaintiffs at his deposition, we
5 said to him, what is it that you want Facebook to do?

6 And he said, I want them to make it evident what they're
7 doing with the photos.

8 And we said, Well, look at this policy; doesn't this make
9 it evident?

10 And he said, They do make it evident, yeah, they do.

11 So each class member is going to have to come in and,
12 under *Rosenbach*, they're going to have to show that they are
13 aggrieved.

14 Many people will have read the policies that the court
15 found were binding and will understand that those policies mean
16 that we're analyzing their photos and comparing them to the
17 newly uploaded photos from their friends. And those people
18 aren't aggrieved.

19 Other people may say, you know, I didn't know, but I
20 actually don't care, and that's fine. And those people are not
21 aggrieved.

22 This is not about standing. There are many, many cases in
23 which courts find that there's Article III standing, and then
24 they go on to say there's a statutory injury requirement, and
25 it is individualized and can't be demonstrated with common

1 proof and, therefore, you can't certify a class. That's the
2 *Ticketmaster* case from the Ninth Circuit.

3 **THE COURT:** All right. Mr. Tievsky, *Rosenbach*, your
4 opponent says, controls the day. You've heard my doubts. What
5 do you think?

6 **MR. TIEVSKY:** Whether or not *Rosenbach* says what they
7 say it does -- and I don't think that it does, and I agree with
8 Your Honor that the facts of it are so different from the
9 fingerprint case, the putting your thumb on the scanner, that
10 it doesn't reasonably apply here.

11 But, either way, it's a common question. There's no --
12 there's no individual inquiry necessary. Everyone got the
13 same -- there's no dispute about, well, some people saw the
14 data policy and some people didn't. It's the same data policy.

15 Whatever questions there are about *Rosenbach* or about the
16 data policy can be -- can be answered classwide. And that's
17 why we need class certification.

18 **THE COURT:** So in *Rosenbach*, where the court said no
19 privacy injury was alleged, what do you think that meant?

20 **MR. TIEVSKY:** It's a little cryptic, but I think it
21 meant what it says. They chose, for reasons that I cannot
22 explain to you, not to proceed on a theory that there was an
23 injury to their client's privacy. They chose to proceed on a
24 theory that a technical bare statutory violation was --

25 **THE COURT:** Isn't that enough to distinguish

1 *Rosenbach*? I've already found that an invasion of privacy has
2 been alleged.

3 **MR. TIEVSKY:** That's correct, it absolutely is.

4 **THE COURT:** That alone kind of kicks *Rosenbach* to the
5 curb, doesn't it?

6 **MR. TIEVSKY:** It does, Your Honor.

7 When Your Honor asked me last time what the concrete
8 injury was, I said it is the invasion of privacy caused by the
9 violation of the statute. My answer to that question has not
10 change, and *Rosenbach* doesn't change it.

11 **THE COURT:** Ms. Goldman.

12 **MS. GOLDMAN:** Your Honor, what plaintiff said is just
13 not true, because in paragraph 20, in *Rosenbach*, the Court
14 says:

15 "Plaintiff asserts that Alexander's right to privacy
16 is a personal right or a legal right that has been
17 adversely affected."

18 That's paragraph 20. The Court then drops a footnote
19 saying that those allegations aren't in the complaint.

20 The clear import of what the Court is saying there is that
21 she's making an argument on appeal; it's not in her complaint.
22 The Court is assuming that she could amend. So it's addressing
23 that allegation that Alexander had a personal right or a legal
24 right to privacy that has been adversely affected by the taking
25 of his fingerprints in his mother's absence without notice and

1 consent. And the Court says that's not enough. You would have
2 to prove consequential harm.

3 And when we're talking about standing, Mr. Tievsky said,
4 We're not alleging downstream harm. We're alleging that they
5 violated the notice and consent provisions and that that is
6 enough.

7 They were very careful to do that because they didn't want
8 to create an individualized issue.

9 And what *Rosenbach* squarely holds is that it's not enough.
10 That when you take biometric identifiers and do that without
11 notice and consent, there still is no satisfaction of the
12 aggrieved requirement unless you can allege and prove
13 downstream harm.

14 The other reason that standing is different -- standing --
15 the Court made a ruling --

16 **THE COURT:** Yes. There's no confusion about standing
17 in class cert. You don't have to worry about that.

18 Let me ask you a question. What about *Jones*? The
19 Illinois Supreme Court held, in 1943, that "aggrieved" had a
20 specific meaning. *Rosenbach* didn't even mention it. I find
21 that troubling.

22 **MS. GOLDMAN:** *Jones* is a --

23 **THE COURT:** Part of what I do --

24 **MS. GOLDMAN:** *Jones* --

25 **THE COURT:** -- is to decide whether an intermediate

1 court has correctly predicted, in the absence of a state
2 Supreme Court decision, has correctly predicted how the state
3 Supreme Court would hold the issue.

4 I have doubts that *Rosenbach* can be squared with *Jones*.
5 Tell me what you think about that.

6 **MS. GOLDMAN:** Sure, happy to, Your Honor.

7 So, a couple things. One is, under *Emery*, of course, the
8 standard is whether there's convincing evidence that *Rosenbach*
9 would be reversed.

10 There's been four cases that have addressed the aggrieved
11 requirement under this statute. All four of them have held
12 that it requires downstream harm, which the plaintiffs here are
13 not alleging.

14 So it's *Rosenbach*, it's also *Vigil vs. Take-Two*, it's also
15 the *McCollough* case, and it's also the trial court decision in
16 *Rottner*, which we submitted.

17 But putting that to one side, *Jones* has nothing to do with
18 this. *Jones* was about a venue statute. And the statute
19 addressed the right of an insurance company to come in and
20 claim that some privileges given to a different insurance
21 company were permissible under a certain regulation. And it
22 says that the suit could be brought in any place where the
23 aggrieved party has a principal place of business.

24 That's a totally different kind of statute. They were
25 figuring out, you know, whether this third party could come in

1 and sue.

2 What *Rosenbach* is saying is that, in the context of the
3 BIPA statute, "aggrieved" means that you need downstream harm.
4 And what it's saying is, otherwise, the word "aggrieved" would
5 be superfluous.

6 And the Court is well aware that Illinois has a standing
7 requirement that's coextensive with federal law. Not every
8 statute says -- so anytime somebody comes into Illinois court,
9 they have to allege a concrete injury in order to bring their
10 suit.

11 Many statutes, though, don't say "aggrieved." So the
12 court is saying when the Legislature used the word "aggrieved,"
13 it meant something more.

14 And in this case we think the something more is something
15 more than the taking of biometric identifiers without notice
16 and consent. The opinion is completely unqualified on that
17 ground. It's not qualified at all.

18 So we would submit that a venue statute --

19 **THE COURT:** It's not qualified, but it may be wrong.
20 That's the point I'm getting to.

21 **MS. GOLDMAN:** We respectfully submit that the Court
22 does not have a basis to say that there is convincing evidence
23 that *Rosenbach* will be reversed by the Illinois Supreme Court.

24 There certainly is not convincing evidence that that is
25 wrong given that four courts have construed the BIPA statute,

1 and have construed this word in the BIPA statute, and they've
2 all come out the same way.

3 **THE COURT:** Well, they've all come out against me on
4 *Spokeo* as well. A few headwinds from the Second Circuit are of
5 really no moment right now.

6 Mr. Tievsky, what do you think about the case *Jones*?

7 **MR. TIEVSKY:** I think that the *Jones* case is quite
8 clear about what it says. It's a --

9 **THE COURT:** Well, how do you square them?

10 **MR. TIEVSKY:** How do I square *Rosenbach* and *Jones*? I
11 can't. I think *Rosenbach* is wrongly decided.

12 **THE COURT:** Tell me why.

13 **MR. TIEVSKY:** Because *Jones* is -- the Illinois Supreme
14 Court case it quite clear as to -- I mean, the quote we have in
15 our brief is "a person who is immediately aggrieved by the act
16 done and not one who is only consequently aggrieved." I think
17 that's right on point.

18 There's numerous Illinois appellate court decisions after
19 that, explaining that aggrieved means that in context. And, in
20 fact, the U.S. Supreme Court, when it analyzes that word
21 "aggrieved" -- it did so in *Doe v. Chao* -- it says coextensive
22 with Article III standing.

23 You know, I think that --

24 **THE COURT:** Coextensive?

25 **MR. TIEVSKY:** Yes, yes. Aggrieved means --

1 **THE COURT:** I actually think *Rosenbach* is, in some
2 ways, an implicit standing opinion more than anything else.

3 If you look at what *Rosenbach* says, they talk about
4 basically injury in fact, concreteness of the harm. I mean,
5 language that is highly reminiscent of the *Spokeo* inquiry.

6 **MR. TIEVSKY:** I think that's right. And the reason
7 it's done in the context it's done in is because Illinois'
8 standing requirement is not actually the same as the federal
9 requirement. It's different.

10 Standing is an affirmative defense in Illinois, that
11 defendant has to raise and then prove a lack of standing.

12 **THE COURT:** Well, it's also different because I'm a
13 court of limited jurisdiction. Illinois is a court of general
14 jurisdiction.

15 **MR. TIEVSKY:** That's correct. And in some states,
16 standing is still jurisdictional. In Illinois, that is not the
17 case. It is not jurisdictional.

18 **THE COURT:** So what do you think is the best reason
19 why *Rosenbach* is inconsistent with *Jones*?

20 **MR. TIEVSKY:** *Rosenbach* -- *Rosenbach* -- to the extent
21 that *Rosenbach* purports to hold that some -- some
22 consequential -- it says nonpecuniary is okay, but I don't
23 really know what that means. To the extent that it holds that,
24 you can only consider a consequential downstream harm, as Your
25 Honor put it, to satisfy the aggrieved requirement.

1 To the extent it reads that much into that word,
2 "aggrieved," it conflicts with the plain meaning of that word
3 as --

4 **THE COURT:** There was no statutory analysis of
5 aggrieved --

6 **MR. TIEVSKY:** Not that --

7 **THE COURT:** -- in *Rosenbach*.

8 **MR. TIEVSKY:** Very little. And certainly none that
9 relied on Illinois Supreme Court opinions. And I don't --

10 **THE COURT:** In fact, *Rosenbach* didn't even mention
11 *Jones*, did it?

12 **MR. TIEVSKY:** No. It did not. It relied, instead, on
13 federal cases, for reasons that, again, I --

14 **THE COURT:** Do you have any reason to believe that
15 *Jones* is no longer good law in Illinois?

16 **MR. TIEVSKY:** I have no reason to believe that, no.

17 **THE COURT:** Why is that? What do you think is the
18 latest iteration of *Jones* in Illinois? Do you have a case for
19 that?

20 **MR. TIEVSKY:** We've got a few Illinois Appellate Court
21 cases.

22 *In re Appointment of Special Prosecutor*, 2009, says a
23 person is aggrieved in the legal sense when a legal right has
24 been invaded.

25 Relaying also, aggrieved means to suffer from an

1 infringement or denial of legal rights.

2 The Illinois appellate court has been relatively
3 consistent on that front with the exception of *Rosenbach*. It
4 sort of came out of nowhere.

5 And I should add, also, that Illinois Appellate Court
6 districts are not bound by each other's opinion. And this
7 matter is up on appeal --

8 **THE COURT:** Well, it's just like California.

9 **MR. TIEVSKY:** -- in a different district.

10 Yes. There is less deference --

11 **THE COURT:** Sorry I interrupted you.

12 What's on appeal?

13 **MR. TIEVSKY:** This same -- well, so not on a certified
14 question but, in fact, on a direct appeal.

15 **THE COURT:** The Illinois Supreme Court?

16 **MR. TIEVSKY:** The Illinois Appellate Court, First
17 District, will be hearing this case -- will be hearing it in
18 another case.

19 **THE COURT:** Well, as far as you know, none of these
20 issues have been presented to the Illinois Supreme Court?

21 **MR. TIEVSKY:** There's been a petition for a leave to
22 appeal filed in *Rosenbach*.

23 **THE COURT:** Do you know the timeline for that?

24 Are you from Illinois?

25 **MR. TIEVSKY:** I am from Illinois, yes.

1 **THE COURT:** You're the Illinois court expert. What's
2 the timeline for that?

3 **MR. TIEVSKY:** So the petition has been filed. The
4 defendant -- it was filed last week, so the defendant has
5 another two weeks to decide if they want to respond.

6 And then the amount of time the Supreme Court takes to
7 decide on it is highly variable, so do I not know when that
8 will be.

9 **THE COURT:** All right. Anything else, Ms. Goldman?

10 **MS. GOLDMAN:** Yes, Your Honor.

11 Looking at what *Jones* actually said, the statute in that
12 case refers to -- it explains that the suit can be brought in a
13 county in which the principal office in the state of the
14 company aggrieved by such order or decision is located or where
15 the person so aggrieved resides.

16 It's a very -- in addition to being a venue statute, it's
17 not even the same language that we're talking about here. Here
18 the statutory language is, aggrieved by a violation of the act.

19 The notion that an 80-year-old case that is construing a
20 different phrase in a different kind of statute renders --
21 constitutes convincing evidence that the Illinois Appellate
22 Court got it wrong in *Rosenbach* in a way that is meaningful
23 here, it's just not enough.

24 **THE COURT:** All right.

25 **MS. GOLDMAN:** It's just not enough.

1 **THE COURT:** Okay. I will have --

2 **MR. TIEVSKY:** I'm sorry. Your Honor, let me correct
3 myself on one point. I misstated that timeline. Actually, the
4 defendant's time to respond has already expired.

5 **THE COURT:** And they didn't respond?

6 **MR. TIEVSKY:** They did -- I do not know. It's not
7 posted online, and I haven't called Springfield, yet, to find
8 out.

9 **THE COURT:** All right. Thank you.

10 Let's talk about scheduling.

11 Mr. Williams, do you want to join us?

12 **MS. GOLDMAN:** Your Honor, one housekeeping note,
13 actually, on class cert.

14 **THE COURT:** Yes.

15 **MS. GOLDMAN:** We didn't have the Court's order on
16 standing when we filed our opposition to class certification.

17 I just want to make clear that we preserve our objections
18 to that order, and also that we think federal standing is an
19 individualized issue that, in addition to the ones identified
20 in our brief, would preclude certification here.

21 **THE COURT:** Well, that's between you and the circuit,
22 so.

23 **MS. GOLDMAN:** Thank you.

24 **THE COURT:** Okay. Let's talk about scheduling.

25 I haven't looked at all, as I indicated, at the summary

1 judgment motion. But let's just assume trial is going to go
2 forward. Okay. I don't know, but let's just assume.

3 **MR. WILLIAMS:** I'm sorry. I didn't hear what you
4 said.

5 **THE COURT:** I haven't looked at the other summary
6 judgment motion, but let's just assume trial is going to go
7 forward. I have, the rest of the year, a very carefully
8 crafted architecture for trial dates, and I can't move it very
9 much. Okay?

10 So here's what I'd like to do. Why don't we come in
11 earlier on summary judgment, the next summary judgment.

12 Are those *Daubert* motions?

13 **MR. NADALENCO:** There are *Daubert* motions as well,
14 Your Honor.

15 **THE COURT:** All right. So we'll do all of that on --
16 let me see my notes here. Oh, yes. Why don't we do all that
17 on May 3rd. Okay? So it's currently set for, I think, May --

18 **MR. WILLIAMS:** 16th, is it?

19 **THE COURT:** -- 17th, maybe?

20 **MR. WILLIAMS:** 17th, yes.

21 **THE COURT:** Yes. Let's move that up two weeks, to
22 May 3rd. And then we'll do the pretrial conference on
23 June 14th. And I'll have you in for trial on July 9th. So
24 it's about a six-week slip. That's the best I can do.

25 **MR. WILLIAMS:** Your Honor, that looks fine for us

1 here. The only thing that I would ask is that some of the --
2 some of the dates in your standing order --

3 **THE COURT:** Yes.

4 **MR. WILLIAMS:** -- for civil trials, they stagger a
5 number of things that would have to be exchanged between the
6 parties and submitted to the Court.

7 And I just wanted to know if there's any flexibility on
8 the timing within those periods. I think that might make it
9 easier.

10 Some require an exchange of motions in limine, for
11 example, as opposed to just filing of them and then submitting
12 them to the Court ten days later or something like that. I
13 don't have the exact timeline in my head.

14 **THE COURT:** I tell you what. You all can work that
15 out, all right, within the parameters of those dates, okay. So
16 if you want to give yourselves some little extra room
17 internally, that's fine.

18 I just want to stick with those dates, and I need the
19 things in advance so I can review them with enough time on my
20 end to get through it. Okay?

21 **MR. NADALENCO:** Your Honor --

22 **THE COURT:** Yes.

23 **MR. NADALENCO:** -- I apologize, may I have the dates
24 one more time? I have the May 3rd day.

25 **THE COURT:** May 3rd. Pretrial conference on June 14.

1 And then trial on July 9.

2 **MR. NADALENCO:** I'm not aware of conflicts at this
3 point.

4 **THE COURT:** Are we good?

5 **MR. NADALENCO:** I believe we're okay, Your Honor. If
6 not, we will alert the Court as soon as we can.

7 **THE COURT:** Well, if there's any problem, I -- I'm
8 trying to accommodate everybody here, including me. So it
9 would have to be a rather sizable problem. Let's just count on
10 those dates.

11 **MR. NADALENCO:** Okay.

12 **MR. WILLIAMS:** Very good, your Honor.

13 **THE COURT:** All right. Now, we're getting close to
14 the end here, at least for the Facebook side.

15 Where are you all in trying to work this out informally?

16 Mr. Williams?

17 **MR. WILLIAMS:** As you know, we had a full-day
18 mediation with Retired Judge Layn Phillips about a year ago.

19 **THE COURT:** Oh, you did?

20 **MR. WILLIAMS:** A little less than a year ago.

21 **THE COURT:** All right.

22 **MR. WILLIAMS:** We haven't had any meaningful
23 discussions about possible resolution since then. We're -- at
24 least from our perspective, we think -- and I think we've
25 indicated this to you, and I've said it to Mr. Nadalenco --

1 that we think that those discussions are important to have even
2 if you don't reach a resolution. So we're willing to do that.

3 You know, time is getting tight, and there's probably
4 limited opportunities to do so, but we're open to having those
5 discussions.

6 **THE COURT:** Mr. Nadalenco.

7 **MR. NADALENCO:** We agree that the discussions were not
8 fruitful. We have not had discussions since. I'm not sure it
9 will be fruitful. And we believe the best way to resolve the
10 case is through the motions that we've filed.

11 **THE COURT:** Well, with everything else going on in the
12 world, maybe this is a good time for Facebook to look at all of
13 its privacy practices, not just the ones in the news.

14 Isn't the time ripe for sitting down with Mr. Williams and
15 his colleagues and seeing what can be done?

16 **MR. NADALENCO:** We're happy to confer with our client
17 and report back to Mr. Williams.

18 **THE COURT:** All right. That's not enough. So here's
19 what we're going to do. I'm going to send you to Magistrate
20 Judge Ryu. She can see you in the next 30 to 60 days.

21 She's very busy, but I think she's going to be able to fit
22 you in. Ultimately, it will be up to her schedule. But I am
23 going to refer you to her. She will set the dates.

24 Each side is required to have a client representative
25 attend the settlement discussions with Judge Ryu in person,

1 with full settlement authority. That is my order. Regardless
2 of what happens elsewhere.

3 I will be highly troubled if I get a report that a client
4 representative is not present or that client representative was
5 not authorized with full authority to settle on the spot for
6 both sides.

7 Is that clear, Mr. Williams?

8 **MR. WILLIAMS:** Very good.

9 **THE COURT:** Mr. Nadalenco?

10 **MR. NADALENCO:** Absolutely, Your Honor.

11 **THE COURT:** All right. She'll have you in. I'll make
12 that referral today. And, otherwise, I will see you on
13 May 3rd. Okay?

14 (Counsel thank the Court.)

15 **MR. MILIAN:** Your Honor.

16 **THE COURT:** Oh, yes.

17 **MR. MILIAN:** Just to be clear, the cases have been
18 consolidated. Does that include the Gullen case, as well, for
19 the mediation and the dates?

20 **THE COURT:** Yes.

21 **MR. MILIAN:** Thank you, Your Honor.

22 (At 10:45 a.m. the proceedings were adjourned.)

23 - - - -

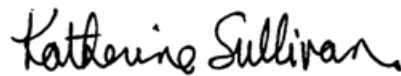
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Tuesday, April 3, 2018

A handwritten signature in cursive script that reads "Katherine Sullivan". The signature is written in black ink and is positioned above a horizontal line.

Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter